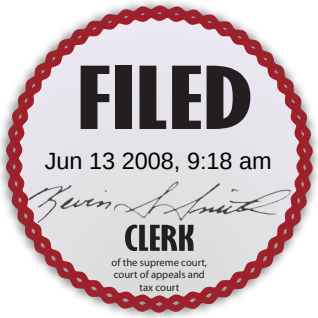

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IN THE
COURT OF APPEALS OF INDIANA

RANDY L. PEMBERTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0712-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0611-FB-681 and 53C02-0608-FD-405

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Randy L. Pemberton appeals the sentence imposed by the trial court.

We reverse and remand.

ISSUE

Whether the aggregate sentence imposed violates the statutory limitation on non-violent consecutive sentences.

FACTS

On August 29, 2006, the State charged Pemberton with two class D felonies arising from an incident on August 28th. The information (Cause No. 405) alleged in Count I that he committed domestic battery upon his wife, Evelyn Pemberton, in the presence of a child; and in Count II, that he committed intimidation of her.

On November 27, 2006, in another information (Cause No. 681), the State charged Pemberton with committing five offenses on November 20, 2006. Cause No. 681 charged as follows: Count I, burglary of Evelyn Pemberton's residence, a class B felony; Count II, intimidation, a class D felony; Count III, domestic battery, a class A misdemeanor; Count IV, invasion of privacy (by violating a court order), a class A misdemeanor; and Count V, criminal mischief, another class A misdemeanor.

Pemberton's appellate record includes neither a plea agreement nor a transcript of a plea hearing. However, according to the transcript of the sentencing hearing on October 17, 2007, Pemberton appeared "on September 13, 2007, and entered pleas of guilty to four separate counts under two cause numbers"; and the trial court "accepted [his] pleas and the plea agreement and entered judgment." (Tr. 4). The sentencing order

reflects Pemberton's convictions were for Count I and Count II in Cause No. 405 (domestic battery in the presence of a child, and intimidation; both as class D felonies), and for Count II and Count IV in Cause No. 681 (intimidation, as a class D felony; and invasion of privacy, as a class A misdemeanor).

At the sentencing hearing, the statement of Evelyn Pemberton provided the following facts as to the incident of August 28th. At approximately 2:00 a.m., Mrs. Pemberton was in bed with the parties' five-month-old grandchild when Pemberton "came stomping up the stairs, cursing," and woke her. (Tr. 7). Pemberton was "yelling and threatening [her] with a knife." *Id.* As Mrs. Pemberton lay in the bed with the sleeping child beside her, he held a knife "to [her] throat" and he said "he would kill [them] all." *Id.* The baby awoke and began screaming. The parties' adult daughter and her child, age 2 ½, came to the door "crying and yelling for him to stop," and Pemberton "went after them with the knife." (Tr. 8). Mrs. Pemberton "talked him into going to the basement so he would be away from the kids." (Tr. 9). They went downstairs, Pemberton behind her "with the knife at the back of [her] neck." *Id.* There, Pemberton "kept yelling and threatening [her,]" telling her [he] was going to take the knife up through [her] throat and out through [her] nose." (Tr. 9-10). Pemberton beat her with a piece of a chair. She suffered scratches and "bruises" on "basically the whole body from being physically abused." (Tr. 10).

Mrs. Pemberton's statement indicated that on November 20th, Pemberton came to her locked door and beat on it, telling her "he was going to kill [her] for ruining his life." (Tr. 11). She told him to leave and instructed their 16-year-old daughter to call the

police. He "threw a bottle of some type of liquor" through the front window and "busted" the door "to let himself in." *Id.* Pemberton threw something at her, "went after [her], saying he was going to kill" her – "choking and knocking [her] against the walls and stairs." *Id.* She "passed out," and came to as their daughter "pulled him off of [her]." *Id.* Pemberton "came after [her] again" and "started yelling and threatening" both of them. (Tr. 11, 12). Pemberton "told [them] . . . he was going to kill [them]." (Tr. 12). Mrs. Pemberton suffered rug burns, choke marks on her neck, contusions, a minor head injury, and a dislocated tailbone.

The trial court also heard the statement of the Pembertons' 16-year-old daughter describing "the night [her] father beat down the door and attacked [her] mom." (Tr. 20). She said she heard her "mother screaming," and ran to see "[her] dad . . . on top of [her,] choking her." *Id.* She "fought with him to get him off" of her mother, and then he "came after [her]" and "pulled his fist back," threatening to hit her. *Id.*

The trial court found as aggravating circumstances Pemberton's undisputed prior criminal history and "the egregious nature of these particular offenses," as well as the existence of "a protection order . . . that he violated,"[1] and that "prior attempts at rehabilitation" had been unsuccessful. (Tr. 37, 38). It ordered that on Cause No. 405, Pemberton serve three years for Count I, domestic battery in the presence of a child, as a class D felony, and three years for Count II, intimidation, as a class D felony, "consecutive to each other and to [Cause No.] 681." (Tr. 38). It then ordered that in

[1] According to the pre-sentence investigation report, to which Pemberton indicated he had no corrections, a protective order was issued on September 21, 2006.

Cause No. 681, Pemberton serve three years for Count II, intimidation as a class D felony, and one year for invasion of privacy, as a class A misdemeanor, "again consecutive to each other and to [Cause No.] 405." *Id.*

DECISION

Pemberton argues that the trial court erred when it sentenced him to serve consecutive sentences on Counts I and II, the class D felony offenses in Cause No. 405. Specifically, he contends that because the offenses "were not crimes of violence as defined by Indiana law and were not crimes that mandated consecutive sentences," the aggregate sentence for those two offenses cannot exceed the four-year advisory sentence for a class C felony offense. Pemberton's Br. at 5. The State concedes that he is correct.

The trial court's sentencing authority is only that which is conferred by the legislature. *Cooper v. State*, 831 N.E.2d 1247, 1252 (Ind. Ct. App. 2005), *trans. denied*. Generally, the trial court "may order terms of imprisonment to be served consecutively." I.C. § 35-50-1-2(c).

> However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [the habitual offender or habitual controlled substance offender provisions], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Id.

The sentences challenged by Pemberton are those imposed for his commission of domestic battery in the presence of a child and intimidation. Neither offense is defined by the statute as a crime of violence. *See* Ind. Code § 35-50-1-2(a) (defining crimes of

violence "as used in this section"). Moreover, we have held that the statute expresses clear legislative delineation of "the exact crimes" that are "to be considered violent crimes" in determining whether consecutive sentencing may be ordered. *Ballard v. State*, 715 N.E.2d 1276, 1279 (Ind. Ct. App. 1999). Thus, any characterization of Pemberton's crimes on August 28, 2006 as being violent in fact is of no moment. Further, the crimes of Cause No. 405 were committed by Pemberton during a single episode of criminal conduct in the early morning hours of August 28, 2006. Thus, the statutory limitation applies.

The crimes of Cause No. 405 were class D felony offenses. The advisory sentence for a class C felony offense is four years. *See* Ind. Code § 35-50-2-6. Hence, "the total of the consecutive terms of imprisonment" which the trial court was authorized to impose for the two class D felony offenses by Pemberton is four years. I.C. § 35-50-1-2(c). Therefore, the trial court erred when it ordered that Pemberton serve consecutive sentences of three years each for the two class D felony offenses in Cause No. 405 because the result is a six-year total of the consecutive terms of imprisonment. By law, Pemberton's aggregate sentence for Cause No. 405 cannot exceed four years.

We elect to remedy the sentencing error committed, and we begin by noting the trial court's clear intent to sentence Pemberton to the maximum sentence allowed. Consistent with that intent, and the basis therefor being amply found in the record, we revise the sentences in Cause No. 405 to a term of two years on each offense, and order those sentences to be served consecutive to each other and consecutive to his sentence in

Cause No. 681, for an aggregate sentence of eight years. *See Bradley v. State*, 867 N.E.2d 1282, 1286 (Ind. 2007) (modifying sentence to remedy error of law).

We hereby reverse and remand to the trial court for the issuance of a revised sentencing order and commitment order consistent with this opinion.

NAJAM, J., and BROWN, J., concur.